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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH BRITTON,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
et al.,

Defendants and
Respondents.

B282994

(Los Angeles County
Super. Ct. No. BS164585)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Amy D. Hogue, Judge. Affirmed.

The Gibbons Firm, Elizabeth J. Gibbons, for Plaintiff and
Appellant.

Law Office of Kessel & Associates, Elizabeth M. Kessel,
Alexis N. Cirkinyan and Armineh Megrabyan, for Defendants
and Respondents County of Los Angeles and Jim McDonnell.

Joseph Britton appeals from the judgment of dismissal entered after the superior court sustained without leave to amend the demurrer of the County of Los Angeles and former Los Angeles County Sheriff Jim McDonnell (collectively the County) to Britton's petition for writ of mandate. Britton contends the court erroneously concluded his petition failed to allege a clear and present ministerial duty on the part of the County to include overtime wages in back pay after an unsustained discharge. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Britton's Employment with the Los Angeles County Sheriff's Department

Britton became a deputy sheriff with the Los Angeles County Sheriff's Department in 2007. In 2013 he was assigned to the Men's Central Jail. According to Britton, between 2013 and 2016 there were "rules, regulations and/or official orders" in place that required each deputy sheriff assigned to the Men's Central Jail to work a minimum of 10 eight-hour overtime shifts each month in addition to his or her regularly scheduled shifts.

In July 2013 Britton was discharged from his position based on alleged misconduct. He appealed the discharge to the Los Angeles Civil Service Commission (the Commission), which appointed a hearing officer who conducted a hearing over 12 days in 2014 and 2015. The hearing officer issued his proposed findings in July 2015. He recommended Britton's discharge be reversed and Britton be reinstated to his position as a deputy sheriff with back pay and benefits. The Commission adopted the hearing officer's recommendations in November 2015, and Britton was reinstated to active duty in January 2016.

In March 2016 the County paid Britton the salary and benefits he would have accrued but for the unsustained termination. This payment did not include any compensation for overtime Britton argues he would have been required to work between 2013 and 2016 pursuant to the mandatory overtime policies at the Men's Central Jail. Britton wrote to the County requesting payment for the 2,400 hours of overtime pay he would have received if he had been employed between July 2013 and January 2016 (80 hours per month for 30 months). After receiving no response, Britton filed a claim against the County pursuant to Government Code section 910. The claim was deemed rejected due to the County's failure to act. (See Gov. Code, § 912.4, subd. (c).)

2. *Britton's Petition for Writ of Mandamus and the County's Demurrer*

On September 1, 2016 Britton filed this action against the County¹ seeking a writ of mandate pursuant to Code of Civil Procedure section 1085 (section 1085). Britton alleged the County had "a ministerial duty required by law to pay Petitioner, as part of his back pay as ordered by the Civil Service Commission, wages lost for all mandatory overtime hours he was prevented from working due to Respondents' improper discharge action." In support of this position the petition alleged Britton was entitled to overtime pay pursuant to the County's salary ordinance (L.A. County Code, tit. 6) and, specifically, Los Angeles

¹ Britton named as defendants the County of Los Angeles, in its own name and erroneously as "the Los Angeles County Sheriff's Department," and then-Sheriff Jim McDonnell in his official capacity.

County Code section 6.20.100 (section 6.20.100), which provides that a wrongly discharged employee is entitled to “his [or her] base rate of salary, vacation and sick leave as if such unsustained reduction, suspension or discharge had not been invoked.”

Britton asked the court to issue a writ requiring the County “to immediately pay Petitioner, at the rate of time and one half his regular salary, all mandatory overtime wages, and all associated benefits, for the mandatory overtime hours Petitioner would have been required to work had he not been improperly fired by Respondents.”

The County demurred to the petition, arguing section 6.20.100 “do[es] not provide for the inclusion of overtime in the back pay calculation.” In support of its position the County relied on the plain language of section 6.20.100 and memoranda of understanding between the County and the Association for Los Angeles Deputy Sheriffs (ALADS), which classify overtime wages separately from base rates of salary.

In opposition to the demurrer Britton relied on the general common law principle that back pay after a wrongful discharge “should ‘return[] the [employee] to the financial position he [or she] would have been in had the unlawful [conduct] not occurred.’” (*Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1133.) Britton’s opposition did not address the County’s argument regarding section 6.20.100.

During oral argument on the demurrer, after the court had issued a tentative decision to sustain the demurrer, Britton’s counsel argued for the first time that the County’s interpretation of section 6.20.100 conflicted with the Public Safety Officers Procedural Bill of Rights Act (POBRA) (Gov. Code, § 3300

et seq.). While she did not cite to a specific section of POBRA, counsel stated the exclusion of compensation for missed mandatory overtime from the calculation of back pay owed to Britton amounted to a “reduction in salary or a reduction in benefits” in violation of POBRA. After giving the County’s counsel an opportunity to respond, the court stated, “It’s a little concerning that you want to make the Bill of Rights argument, but frankly, if it’s not raised in opposition, I don’t—the court has no reason to address it.”

On February 24, 2017 the superior court adopted its tentative decision and sustained the demurrer without leave to amend. The court found Britton had “failed to allege a clear, present duty on the part of Respondents to reimburse Petitioner for overtime. The Court agrees that Respondents’ duty to reimburse Petitioner is governed by LACC 6.20.100(B), which clearly states that a reinstated employee is entitled to his ‘base rate of salary, vacation and sick leave.’ It makes no reference whatsoever to overtime pay.” The court also relied on the applicable memoranda of understanding, which, it found, “differentiate between a Deputy Sheriff’s base rate of salary and additional amounts paid for overtime worked. . . . [The] reference to mandatory overtime [in the memoranda] suggests that even ‘mandatory overtime’ is an additional form of compensation rather than a component of a Deputy Sheriff’s base rate of pay.”

3. Britton’s Motion for Reconsideration

Britton moved for reconsideration pursuant to Code of Civil Procedure section 1008 on March 6, 2017. Britton asserted the motion was “based upon new law, namely, the interpretation of County Code § 6.20.100 first raised by Respondents in their Reply Brief” The motion requested the court reconsider its

denial of leave to amend the petition so that Britton could allege section 6.20.100, as interpreted by the County and the court, conflicted with POBRA. Britton also sought leave to amend his petition to allege facts showing the County's payments to Britton included items not enumerated in section 6.20.100 and thus the County has "long interpreted and applied County Code section 6.20.100 to require payment as back pay to reinstated employees all contractual and legally required employment benefits," including mandatory overtime wages.

The superior court denied the motion for reconsideration on May 26, 2017, finding Britton had failed to identify any new law or facts as required by Code of Civil Procedure section 1008. The court alternatively rejected Britton's argument on the merits, finding Britton had failed to "cite any provision in POBRA that, as a matter of law, preempts" section 6.20.100. The court further found any alleged prior interpretation of section 6.20.100 "cannot give rise to a ministerial duty that is inconsistent with statutory language."

4. The Notice of Appeal

Although no signed dismissal or other appealable order had yet been entered, Britton filed a notice of appeal on June 2, 2017. (See *Vibert v. Berger* (1966) 64 Cal.2d 65, 67 ["our courts have held it to be 'hornbook law that [an] order sustaining a demurrer is interlocutory, is not appealable, and that the appeal must be taken from the subsequently entered judgment"]; see generally Code Civ. Proc., § 581d [all dismissals ordered by the court "shall be in the form of a written order signed by the court and filed in the action"].) However, a judgment of dismissal was entered on September 21, 2017. Accordingly, pursuant to rule 8.104(d)(1) of

the California Rules of Court, we treat the premature notice of appeal as filed immediately after entry of the judgment.

DISCUSSION

1. *Governing Law and Standard of Review*

A writ of mandate “may be issued by any court . . . to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded” (§ 1085, subd. (a).) The petitioner must demonstrate the public official or entity had a ministerial duty to perform and the petitioner had a clear and beneficial right to performance. (§ 1086; see *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1084-1086; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540.)

“A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists. Discretion . . . is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]’ [Citations.] Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner.” (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700-701.)

“The requirement that a petitioner be “beneficially interested” has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) To warrant writ relief, “[t]he beneficial interest must be direct and substantial.” (*Ibid.*; accord, *Chorn v. Workers’ Comp. Appeals Bd.* (2016) 245 Cal.App.4th 1370, 1382 [writ relief is not available if the petitioner “gains no direct benefit from the writ’s issuance, or suffers no direct detriment from its denial”].)

A demurrer tests the legal sufficiency of the factual allegations in a petition or complaint. We independently review the superior court’s ruling on a demurrer and determine de novo whether the complaint or petition alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; see *SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1051 [“[w]e review the petition and complaint de novo ‘to determine whether it alleges facts stating a cause of action under any legal theory’”]; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 277 [“[o]n appeal from a dismissal entered after an order sustaining a demurrer to a petition for writ of mandate, we review the order de novo, determining independently whether the petition states a cause of action as a matter of law”].)

We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those

expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation]; *SJJC Aviation Services, LLC v. City of San Jose, supra*, 12 Cal.App.5th at p. 1051 [“[o]ur review is governed by settled standards, which apply equally whether a demurrer challenges a complaint or a petition”].)

2. Statutory Framework

The parties agree the terms and conditions of Britton’s employment, discharge and reinstatement as a deputy sheriff are governed by state statute, county code and the memoranda of understanding (MOU’s) between the County and ALADS in effect from 2013 to 2016.² (See *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1629 [“terms and conditions of employment under which the Department’s deputies perform their duties are governed by the parties’ MOU, the Meyers-Milias-Brown Act or ‘MMBA’ (Gov.

² The superior court granted the County’s unopposed request to take judicial notice of section 6.20.100 and excerpts of the MOU’s in effect during the relevant period. Britton has not appealed that ruling or disputed the characterization of the documents provided by the County. We also take judicial notice of those documents. (See Evid. Code, §§ 452, subd. (c); 459, subd. (a)(1); *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 647, fn. 13 [taking judicial notice of county code and MOU between sheriff’s union and county].)

Code, § 3500 et seq.), the Public Safety Officers Procedural Bills [sic] of Rights Act or ‘POBR’ (Gov. Code, § 3300 et seq.), and the employee relations ordinance of the county of Los Angeles (L.A. County Code, tit. 5, ch. 5.04).”].)

POBRA “sets forth a list of basic rights and protections which must be afforded all peace officers [citation] by the public entities which employ them. It is a catalogue of the minimum rights [citation] the Legislature deems necessary to secure stable employer-employee relations.” (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 320.) “The MMBA applies to local government employees in California. [Citation & fn. omitted.] ‘The MMBA has two stated purposes: (1) to promote full communication between public employers and employees, and (2) to improve personnel management and employer-employee relations. ([Gov. Code,] § 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations ([Gov. Code,] § 3502), and obligates employers to bargain with employee representatives about matters that fall within the “scope of representation” ([Gov. Code,] §§ 3504.5, 3505).’” (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

“In applying the [MMBA], ‘the courts have uniformly held that a memorandum of understanding, once adopted by the governing body of a public agency, becomes a binding agreement.’” (*Glendale City Employees’ Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 337; accord, *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182 [memoranda of understanding between public employer and employees “are binding and constitutionally

protected”].) Accordingly, an “MOU, entered into between the county and the [union] on behalf of employees . . . is ‘a mutually agreed covenant, a labor management contract. . . . [¶] . . . [A]ll modern California decisions treat labor-management agreements . . . as enforceable contracts [citation] which should be interpreted to execute the mutual intent and purpose of the parties.’ [Citation.] “Thus, “[w]e are free to make our own independent interpretation of the terms of the contract and its application to the instant dispute.””” (*Riverside Sheriffs’ Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1424.)

The governing principles of statutory interpretation are well-established and familiar: “Our primary task in interpreting a statute is to determine the Legislature’s intent, giving effect to the law’s purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.] ““Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.’ [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided.”” (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037; accord, *In re D.B.* (2014) 58 Cal.4th 941, 945-946 [“we ‘will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended”]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 [in resolving questions of statutory interpretation, the first step ““is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning””].) Similarly, ““[t]he words of a contract are to be understood in their ordinary and popular sense.’ [Citations.]” [Citation.] Furthermore, “[t]he whole of a

contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”” (*Flores v. Nature’s Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9; see Civ. Code, § 1641.)

3. *The Petition Fails To State a Claim the County Had a Clear and Present Ministerial Duty To Pay Overtime to Britton for the Period of His Discharge*

Britton has made a series of arguments raising issues of common law, constitutional law, estoppel and equity. However, the issue on appeal is fundamentally one of statutory and contract interpretation. The parties agree the compensation awarded Britton upon reinstatement is governed by section 6.20.100(B), which states, “In the event an employee is reduced, suspended and/or discharged, and upon appeal the civil service commission or a court having jurisdiction does not sustain such reduction, suspension and/or discharge, the employee shall be entitled to his base rate of salary, vacation and sick leave as if such unsustained reduction, suspension or discharge had not been invoked.” Britton argues the statement an employee should receive his or her base rate of salary “as if” the unsustained discharge “had not been invoked” means the employee is to be made whole and, therefore, he is entitled to receive any mandatory overtime pay he would have worked had he not been discharged.

Britton’s interpretation of the ordinance is contrary to its plain language, which explicitly limits any recovery to three specific categories: base rate of salary, vacation, and sick leave. The language cited by Britton requiring, in effect, that the employee be made whole applies only to those three categories. To construe it as requiring the employee receive on reinstatement

any conceivable compensation or benefit that may have been received if the discharge had not occurred would render superfluous most of the sentence. Such an interpretation is contrary to well-established principles of statutory construction. (See *Tuolomne Jobs & Small Business Alliance v. Superior Court*, *supra*, 59 Cal.4th at p. 1037.)

Britton's suggestion that "base rate of salary" as used in section 6.20.100 incorporates mandatory overtime pay is likewise unavailing. The phrase "base rate of salary" is not defined in the salary ordinance. However, deputy sheriffs' salaries are established not by the salary ordinance, but by the applicable MOU. (See L.A. County Code, § 6.28.140.)³ Accordingly, the provisions of the governing MOU's establishing salary and overtime rates necessarily inform our interpretation of "base rate of salary." (See *Bell v. City of Torrance* (1990) 226 Cal.App.3d 189, 194 [interpretation of MOU and local ordinance must be "harmonized"].)

³ Los Angeles County Code section 6.28.140 provides, "The compensation of any person assigned to a position in a class within an employee representation unit certified by the employee relations commission shall be as provided in the most recent [MOU] for such unit made and entered into between authorized management representatives of the county and the certified employee organization representing such unit and approved by the board of supervisors; provided that: [¶] A. If any provision of Title 6 or other title of the County Code relating to such compensation is in conflict with a provision or provisions contained in the MOU, the MOU provision(s) shall control; and [¶] B. With respect to any matter relating to the compensation of any such employee which is not addressed in the MOU, the applicable provision(s) of Title 6 or other titles of the County Code shall govern."

Article 7 in each of the MOU's between the County and ALADS in effect during the period of Britton's dismissal is titled "Salaries" and establishes "salaries applicable to employees in the Unit." After listing salary ranges for different categories of employees, article 7, section 1 states, "Notwithstanding any other provision of the County Code or memorandum of understanding, employees employed in this class shall be compensated on a seven-step salary range The rate or rates established by this provision constitute a base rate." Thus, by its plain language the MOU defines the "base rate of salary" as the amount specified in the applicable salary range. Article 7 does not mention overtime wages. It follows that overtime wages are not included in the "base rate of salary."

In fact, overtime wages are addressed in a separate article of the MOU's, which confirms that base rate of salary and overtime are separate and distinct types of compensation. Article 8 of the MOU's is titled "Hours of Work and Overtime." Section 2 of article 8 provides, "Overtime for employees in this unit who are covered by [the Fair Labor Standards Act] shall be paid at time and one-half his/her regular hourly rate in accordance with the provisions of FLSA" Because an employee's "regular" or "base" rate of salary is a component in determining the employee's rate of overtime pay, it would be nonsensical for overtime pay to be included in the definition of "base rate of salary."

This plain language interpretation is reinforced by the analysis of other courts examining similar statutes regarding employee back pay, which have come to the same conclusion. For example, in *Swepton v. State Personnel Bd.* (1987) 195 Cal.App.3d 92 the court of appeal considered whether a

reinstated Department of Corrections employee was entitled to recover overtime he would have worked but for his wrongful termination. The governing statute, Government Code section 19584, provided a reinstated employee shall receive “payment of salary” and “reinstatement of all benefits that otherwise would have normally accrued” for the period he or she had been wrongfully terminated. The plaintiff argued he was entitled to lost overtime based on the statute’s purported intent to make a reinstated employee whole after an improper adverse action. The court disagreed, holding that “overtime compensation is embraced neither within the term ‘salary’ nor the term ‘benefits’ as used in section 19584.” (*Swepton*, at p. 98.) The court further explained, “historically the term ‘salary’ has been used in the State Civil Service Act to denominate compensation of a fixed sum for all services rendered. ([Gov. Code,] § 18000.) With respect to the compensation of state employees for work performed in excess of the normal work week, the Legislature used the phrase ‘overtime compensation.’ (See [Gov. Code,] § 19844.) We presume that ‘salary’ was intended to have the same meaning in the State Civil Service Act wherever used. [Citations.] Hence, as used in section 19584, salary is exclusive of ‘overtime compensation.’” (*Swepton*, at pp. 95-96; accord, *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2014) 227 Cal.App.4th 1250, 1257 [“[Government Code] [s]ection 19584 has been held not to authorize the Board to include overtime pay that the employee would have earned from the state in a backpay award as either salary or benefits”]; see also *Los Angeles County Professional Peace Officers’ Assn. v. County of Los Angeles* (2008) 165 Cal.App.4th 63, 68 [“the word ‘salary’ as used in [Labor Code] section 4850 includes fringe

benefits which accrue incident to the employee's service and which require nothing more of the employee than his being or remaining an employee in the service of the employer.' [Citation.] . . . [O]vertime or holiday pay . . . required the employees to work at specified times or a certain number of hours, that is, to do something more than remain an employee"]; *Fenn v. Workers' Comp. Appeals Bd.* (2003) 107 Cal.App.4th 1292, 1297 ["salary" in Labor Code did not include overtime because plaintiff had to meet condition precedent, working "the set number of hours," to obtain the overtime pay]; *Mannetter v. County of Marin* (1976) 62 Cal.App.3d 518 [employee could not recover backpay for missed overtime he had been scheduled to work prior to injury because overtime pay per MOU "was not part of his salary unless (1) he was assigned to work the holiday and (2) he actually worked it"].)

This reasoning applies equally to the use of the terms "salary" and "overtime" in this case—the MOU's characterize salary as a fixed sum for services rendered, whereas overtime pay compensates the employee for hours worked in excess of the normal work week at a rate calculated as a multiple of the employee's "regular" salary. In the absence of any contradicting language in the County Code, this language in the MOU governs our interpretation of section 6.20.100. In sum, because section 6.20.100 does not refer to the separate category of overtime pay, Britton has failed to allege the County had a ministerial duty to include overtime pay in its payment to him upon reinstatement.

Britton's argument that the County's own actions preclude this outcome is misplaced. Britton states, "the Petition alleges that Deputy Britton was paid, directly or indirectly, the amount

he would have received for medical insurance coverage, the amount he would have received for a shooting bonus, the amount he would have received for bilingual pay, credit for all the accumulated sick, vacation, and holiday time he would have received had he not been fired,” and contends payment of these benefits requires the County also to reimburse him for lost mandatory overtime. However, the petition does not allege these facts, as Britton’s counsel acknowledged during oral argument in the superior court. Regardless, even if Britton could amend the petition to allege payment for those items, it would be of no moment. Whether the County had discretion to compensate Britton for benefits not enumerated in section 6.20.100 has no bearing on whether that section imposed a clear and present ministerial duty to include lost overtime in back pay.

4. Britton’s POBRA Argument Is Forfeited

As discussed, during oral argument in the superior court, Britton’s counsel asserted for the first time that the County’s interpretation of section 6.20.100 must be rejected because it violated POBRA. Britton relies on Government Code section 3304, subdivision (a), which prohibits a public agency from subjecting a public safety officer to “punitive action” based on the exercise of the officer’s rights under an administrative grievance procedure. “Punitive action” includes “any action that may lead to . . . reduction in salary.” (Gov. Code, § 3303.) Britton contends the County’s refusal to pay him lost overtime wages constitutes an impermissible reduction in salary under POBRA.

Because Britton failed to present this argument until the hearing in the superior court on the County’s demurrer, it has been forfeited. (See *Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109, 118 [arguing

“general notion” for first time during oral argument in the trial court was insufficient to preserve issue for appeal]; *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 [“[a]ppellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider”].)

Even if Britton’s POBRA argument were not forfeited, it is without merit. As discussed, overtime wages and salary are separate categories of compensation. Failure to pay overtime wages cannot constitute a “reduction in salary” for purposes of POBRA.

5. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

We review the trial court’s denial of leave to amend for abuse of discretion. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 722.) To determine whether the plaintiff can cure a defect, “we consider whether there is a ‘reasonable possibility’ that the defect in the complaint could be cured by amendment.” (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) ““The burden of proving such reasonable possibility is squarely on the plaintiff.” [Citation.] To satisfy this burden, “a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading’” by clearly stating not only the legal basis for the amendment but also the factual allegations to sufficiently state a cause of action.” (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618; accord, *Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081 [“plaintiff has the burden of proving that an amendment would cure the defect”].)

In his brief on appeal Britton did not challenge the trial court's denial of his request to amend his petition, nor did he explain how, if given the opportunity, he would amend his petition to properly assert his claims. During oral argument Britton's counsel stated the petition could be amended to include allegations the negotiators of the MOU's did not intend to exclude overtime compensation from the definition of "base rate of salary." Counsel further represented the petition could be amended to plead that the trial court's interpretation of the salary ordinance and the MOU's violated Britton's constitutional property interest in his salary as well as POBRA's prohibition on a retaliatory reduction in salary. Finally, counsel argued the petition could be amended to allege the County's payments to Britton of several items of compensation not specifically enumerated in the ordinance evidenced the County's understanding that "base rate of salary" was defined more broadly than suggested by the MOU's.

Even if we were to entertain these arguments, many of which were made for the first time during oral argument, Britton has not satisfied his burden to demonstrate these allegations would cure the defects in his petition. As discussed, Britton has failed to present a viable legal theory supported by legal authority or factual assertions that the trial court's interpretation of "base rate of salary" conflicts with POBRA or violates Britton's constitutional property interests. As to potential allegations regarding the intentions of the MOU negotiators or the import of the County's own alleged interpretation of the ordinance, Britton has not identified any ambiguity in the ordinance or the MOU's that would permit the admissibility of such extrinsic evidence. Moreover, even if we

were to consider extrinsic evidence, the meager, generalized evidence proffered does not suggest a different interpretation of the applicable language. Accordingly, there is no basis to reverse the trial court's denial of leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. The County is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

STONE, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.